

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**MARION O'BRYAN STRICKLAND**

**APPELLANT**

**V.**

**CAUSE NO. 2014-KA-01697-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**BRIEF OF APPELLANT**

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**ORAL ARGUMENT REQUESTED**

### **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Marion O'Bryan Strickland, Appellant
2. John R. Henry, Jr., counsel for Appellee
3. Jim Hood, counsel for Appellee
4. Randolph Walker, counsel for Appellant in the Trial Court
5. Nicole H. McLaughlin, counsel for Appellant
6. R. Shane McLaughlin, counsel for Appellant

/s/ R. Shane McLaughlin  
Attorney of record for Appellant

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### **STATEMENT REGARDING ORAL ARGUMENT**

The primary reasons for oral argument in this case are the admission of evidence of prior bad acts and the non-admission of the photographs and text messages of which Strickland was convicted of sending and receiving.

Strickland's trial was unfairly tainted due to admission of alleged prior bad acts under Rule 404(b). Further, Strickland was convicted of enticing a child to send photographs to him by text message conversation in the absence of either the text messages or the offending photograph.

The Court should grant oral argument to discuss these issues.

### **STATEMENT OF THE ISSUES**

1. Whether the Trial Court erred by admitting evidence of unrelated conduct as prior bad acts under Rule 404(b).
2. Whether witness testimony as to the content of text messages and photographs violated the best evidence rule where the evidence was not admitted at trial.
3. Whether Defendant received ineffective assistance of counsel.
4. Whether Defendant was deprived of counsel of his choice when the Trial Court refused to allow the discharge of Defendant's attorney.
5. Whether the verdict is against the overwhelming weight and sufficiency of the evidence adduced at trial.

## **STATEMENT OF THE CASE**

Marion Strickland was indicted on three (3) counts of child exploitation in violation of Miss. Code Ann. § 97-5-33(7). (C.P. p. 6-7).<sup>1</sup>

Strickland was represented by attorney Randolph Walker. (C.P. p. 12). Walker sought to withdraw from the representation on August 21, 2014. (C.P. p. 12). The Trial Court held a hearing and Strickland asked that Walker be discharged. (C.P. p. 17). The Trial Court denied the Motion to Withdraw. (C.P. p. 20).

Strickland was tried on only Count one of the Indictment. (*See, e.g.*, T. p. 24). After a short trial, Strickland was found guilty. (C.P. p. 62).

The Trial Court sentenced Strickland to a term of forty (40) years imprisonment, with twenty (20) years suspended. (C.P. p. 75; T. p. 810).

Strickland timely perfected this appeal.

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<sup>1</sup> Clerk's Papers are cited as "C.P." and the transcript of the hearing in the Trial Court is cited as "T."



## **STATEMENT OF FACTS**

Marion Strickland was a young high school teacher in the South Panola School District. (*See* T. p. 305-06). Strickland taught high school English, advancement placement classes and was the faculty advisor for the Student Council. (T. p. 306, 566). It was undisputed at trial that Strickland was popular and well-liked by students and teachers at the school. (*See, e.g.*, T. p. 504-05, 535).

Strickland is a homosexual, and testified at trial that he was harassed and a victim of gay bashing at the hands of a group of students, most of whom were popular baseball players. (T. p. 577-78, 601).

On October 23, 2012, Strickland was arrested for allegedly enticing a fourteen year old child, K.W., to send Strickland a picture of K.W.'s penis.<sup>2</sup> (T. p. 470). Strickland waived his Miranda rights and gave a statement to investigators. (T. p. 472-73). Strickland admitted many of the operative facts in the both his statement and his subsequent testimony in the Trial Court. (*See, e.g.* T. p. 595-99).

Strickland testified that he engaged in a text message conversation with K.W. in which Strickland masqueraded as a female named "Jordan." (T. p. 595-96). During most of the text messaging at issue in this case, Strickland testified he used a telephone application called Pinger to hide his true telephone number, and make it appear as though his texts were originating from a different telephone number. (*See, e.g.* T. p. 595-99).

Strickland, acting as Jordan, told K.W. that Jordan was a student at a nearby high school. (T. p. 307). Strickland sent various pictures of the fabricated Jordan to K.W., including a picture of a woman's naked buttocks. (T. p. 597). Strickland admitted that K.W. subsequently sent

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<sup>2</sup> Persons who were minors at the time of the subject incidents are referred to by their initials to protect their identities.

“Jordan” a picture of K.W.’s clothed buttocks and, eventually, a picture of K.W.’s nude penis. (T. p. 596-97). Strickland admitted that he requested K.W. to send a nude frontal picture of himself. (T. p. 599). Strickland generally claimed at trial that he was attempting to get K.W. to leave him alone by requesting such a photograph. (T. p. 599). Strickland also testified that he was unsure that the person sending the photographs was K.W. and, since the photograph did not include a face or identifying characteristics, he did not know for certain the identity of the person depicted. (T. p. 607).

The text messages and photographs between Strickland and K.W. were the centerpiece of the trial, but are nowhere in the Record. (*See, e.g.*, T. p. 307-08, 595-99). K.W.’s telephone was erased when it was locked and subsequently re-set. (T. p. 318-19). Investigators claimed they were unable to unlock Strickland’s own cellular telephone, which would also contain the images, although Strickland testified he gave them the passcode. (T. p. 464-65). Strickland’s telephone was in possession of the State at the time of trial. (*See* T. p. 479-80). In any event, the Record is replete with testimony as to the contents of the messages and photographs, some of which is disputed, but the actual evidence was not admitted at trial. (*See, e.g.*, T. p. 307-08, 595-99).

Aside from introducing testimony as to Strickland requesting photographs from K.W., the State also introduced testimony from other students regarding unrelated text message conversations with Strickland. (*See* T. p. 345, 379). Strickland objected admission of this evidence, but the Court overruled his objections. (T. p. 285-286).

The State first called H.D., a student who claimed Strickland sent him texts masquerading as someone named “Jordan” who was purportedly a community college recruiter. (T. p. 345-46). H.D. testified that the text messaging turned sexual and Jordan asked H.D. to send naked

pictures of himself. (T. p. 347). H.D. refused to send any photographs and never sent the requested pictures to Jordan. (*Id.*).

The State had H.D. testify about the contents of the text messaging with Strickland, masquerading as Jordan, but again never admitted the actual text messages. (T. p. 350). H.D. claimed that his cellular telephone “crashed” making the text messages unavailable. (*Id.*).

The State also called M.J., another student who had contact with Strickland. (T. p. 379-80). M.J. testified that Strickland had text message conversations with him masquerading as an Ole Miss student named “Jordan.” (T. p. 382). M.J. testified that Strickland, masquerading as Jordan, requested that M.J. send pictures of his “sexy body” but M.J. declined. (T. p. 383). M.J. never sent any photographs. (*Id.*). The State introduced the text message conversation between M.J. and “Jordan” over Strickland’s objection. (Trial Exhibit No. 4).

The jury convicted Strickland of enticing K.W. to send a visual depiction of sexually explicit conduct in violation of Miss. Code Ann. § 97-5-33(7). (*See* C.P. p. 62). The Trial Court sentenced Strickland to serve a term of forty years, with twenty years suspended. (*See* T. p. 810).

## **SUMMARY OF THE ARGUMENTS**

The Trial Court erred by admitting evidence of Strickland's prior acts pertaining to H.D. and M.J. These acts were not probative for any non-character purpose under Rule 404(b). The mere fact that the allegations in this case involve a crime of sexual-related misconduct does not justify admission of such prejudicial prior acts.

Aside from admission of the prior bad acts, Strickland's conviction should alternatively be reversed because of admission of testimony regarding the contents of the offending text messages and the photograph of K.W. Testimony as to the contents of the messages and photograph was inadmissible at trial without the introduction of the actual documents under the "best evidence rule" stated in Miss. R. Evid. 1002. The State failed to justify admission of the contents of the documents under Rule 1004.

As is conceded in this Brief, Strickland's trial counsel never raised the best evidence rule argument at trial. Strickland contends the admission of the documents was plain error. However, to the extent admission was not plain error, counsel's failure to object to testimony concerning the missing documents amounted to ineffective assistance of counsel, for which Strickland's conviction should likewise be reversed.

Finally, Strickland's conviction is not supported by the Record in any event. Based on the Record before the Court, the jury could not have possibly found Strickland guilty of soliciting a "lascivious exhibition of the genitals or pubic area" of a child. There is no evidence in the Record to which the State can point of any such "lascivious exhibition." The jury could properly find that whatever photograph was sent to have constituted a crime without ever seeing the photograph.

Accordingly, for each of these reasons, Strickland's conviction should be reversed.

## **STANDARD OF REVIEW**

This Court reviews whether a Trial Court erred in denying a motion for directed verdict *de novo*. *Gilmer v. State*, 955 So. 2d 829, 833 (Miss. 2007). The Supreme Court has explained the proper standard of review as:

In considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.

*Ivy v. State*, 949 So. 2d 748, 751 (Miss. 2007).

The admission of evidence is reviewed under an abuse of discretion standard. *Jones v. State*, 904 So. 2d 149, 152 (Miss. 2005). This Court will reverse where the Trial Court erroneously admits evidence that affects a substantial right of the party. *Ladnier v. State*, 878 So. 2d 926, 933 (Miss. 2004). “Although a judge has broad discretion in admitting evidence, evidence of a crime other than the one for which the accused is being tried generally will not be admissible.” *Hargett v. State*, 62 So. 3d 950, 953 (Miss. 2011). Improper admission of prior bad act evidence warrants reversal. *Hargett*, 62 So. 2d at 954-55.

## **ARGUMENT I.**

### **THE COURT ERRED IN ADMITTING EVIDENCE REGARDING H.D AND M.J. UNDER RULE 404(b).**

A defendant's past "crimes, wrongs, or acts" other than those with which he is being charged cannot be admitted into evidence to "prove the character of the person in order to show that he acted in conformity therewith." MISS. R. EVID. 404(b). However, those acts may be admitted to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

This Court will reverse a conviction based on the erroneous admission of evidence of prior bad acts. *Hargett v. State*, 62 So. 3d 950, 953 (Miss. 2011). In *Hargett*, the defendant was convicted of selling illegal drugs. At the trial the State introduced evidence of previous drug sales in which the defendant had taken part. *Hargett*, 62 So. 3d at 952-53. The Supreme Court reversed his conviction on the grounds that evidence of the defendant's prior bad acts was improperly admitted. *Id.* at 954. The Court held that admitting the defendant's prior bad acts violated Mississippi Rules of Evidence 403 and 404(b) and that testimony concerning the acts was "excessive and unnecessary" to tell the entire story of events. *Id.*

Further, admission of prior bad acts may improperly impair a defendant's right not to testify. The Supreme Court held in *Robinson v. State* that evidence of a defendant's prior bad acts was erroneously admitted because it "compromised" a defendant's right not to testify. *Robinson v. State*, 35 So. 3d 501, 507 (Miss. 2010). According to the *Robinson* Court, the defendant "was presented with the options of either taking the witness stand in an attempt to mitigate the prejudice caused, or foregoing that right and permitting the jury's consideration of such evidence without response." *Id.*

The Supreme Court has held that prior sexual misconduct involving “overwhelming similarities” is admissible to prove non-character purposes in a subsequent trial on a similar charge. See, e.g., *Young v. State*, 106 So. 3d 775, 779-80 (Miss. 2012); *Gore v. State*, 37 So. 3d 1178, 1184 (Miss. 2010); *O’Connor v. State*, 120 So. 3d 390, 396 (Miss. 2013). Generally, these cases have concerned identical acts of physical sexual abuse of children. In *O’Connor* the Court affirmed admission of proof that defendant had penetrated other prepubescent girls while they were sleeping when he was accused of doing the same act later. *O’Connor*, 120 So. 3d at 396. Similarly, in *Gore* the Court affirmed admission of evidence that defendant had penetrated other young children in the same manner as was alleged in the subject trial. *Gore*, 37 So. 3d 1178.

First, this line of cases conflicts with the terms of Rule 404(b), and should be narrowed. The Court should not treat allegations of past sexual abuse differently than any other prior bad acts. The text of Rule 404(b) does not differentiate between different crimes. To be faithful to the Rule, the Court should narrow the analysis and hold that all prior bad acts, even those tangentially related to sexual misconduct, are subject to the same Rule 404(b) and 403 analysis.

Even if sexual abuse allegations are treated more leniently under Rule 404(b), this case does not involve the sort of allegations present in the other cases where the evidence was admitted. No one has ever accused Strickland of inappropriately touching children, attempting to inappropriately touch children or luring children to him for the purpose touching. Strickland was accused of exploiting a child by requesting the child to send a nude photograph. No Mississippi case has stretched the reasoning of *Gore*, *Young* or *O’Connor* this far. No case holds that when a Defendant is accused of soliciting such photographs, every other act in which it could be argued Defendant behaved similarly is admissible.

This sort of reasoning would re-write Rule 404(b). If this were the law, prior bad acts would be necessarily admissible in any case involving a hint of sexual misconduct. Sexual acts would be excepted from Rule 404(b) by judicial fiat. This is not the law in Mississippi and it should not be. The Court should decline the invitation to further erode Rule 404(b) to allow for admission of unrelated prior acts.

Next, similar to the reasoning in *Robinson*, Strickland's right to remain silent was compromised because of admission of the prior bad act evidence.<sup>3</sup> Strickland could either remain silent, and be labeled as a serial child predator, or take the stand and attempt to explain. Strickland would not have been confronted with this dilemma had the prior bad act evidence been excluded.

Finally, even if this evidence were properly admissible under Rule 404(b), it should have nevertheless been excluded under Rule 403. The probative value of these unrelated text message conversations, in which Strickland did not consummate the crime charged in this case, is scant. The danger for unfair prejudice is immense. Even with the Court's limiting instruction, Strickland could not receive a fair trial when he was forced to defend against these unrelated prior bad act allegations.

Strickland should be allowed a fair trial, without admission of the inflammatory prior bad act evidence. This Court should reverse Strickland's conviction and remand for a new trial.

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<sup>3</sup> Notably, Strickland's attorney advised that Strickland not testify at trial. (T. p. 550-531). Strickland decided to testify anyway, rather than take his counsel's advice. (T. p. 550-53). Clearly, admission of the prior bad act evidence would have dominated Strickland's decision making process in this regard.



## **ARGUMENT II.**

### **ADMISSION OF TESTIMONY CONCERNING THE MISSING TEXT MESSAGES AND PHOTOGRAPHS VIOLATED THE BEST EVIDENCE RULE.**

The so-called “best evidence rule” is stated in Miss. R. Evid. 1002 as follows:

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided by law.

MISS. R. EVID. 1002.

Rule 1004 provides the exceptions as to when other evidence of the contents of such documents are admissible without admission of the document:

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

- (1) Originals lost or destroyed. -- All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
- (2) Original not obtainable. -- No original can be obtained by any available judicial process or procedure; or
- (3) Original in possession of opponent. -- At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or
- (4) Collateral matters. -- The writing, recording, or photograph is not closely related to a controlling issue.

MISS. R. EVID. 1004.

At the outset of this argument, Strickland concedes that his trial counsel failed to raise this argument below. While arguments not raised in the Trial Court are generally waived, this Court can nevertheless address issues which are “plain error.” *Kirk v. State*, 160 So. 3d 685, 692 (Miss. 2015). As errors go, this one is plain.<sup>4</sup>

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<sup>4</sup> As discussed below, even to the extent this is not plain error, it is evidence that Strickland received ineffective assistance of counsel.

There is no evidence in the Record to justify the admission of testimony regarding the contents of the alleged photographs or the contents of various text messages. Under Rules 1002 no witness could testify as to the content of a photograph or text message unless one of the exceptions of 1004 were met.

The only exception the State might argue is that the original messages and photographs were not obtainable because: 1) K.W.'s telephone was allegedly reset after the time of the messages; 2) the State could not access the data on Strickland's telephone, which was in the State's possession; and 3) H.D.'s telephone allegedly "crashed" after the time of the messages.

The problem with these arguments are they are unsupported by the Record. The State could have presented evidence, for instance, describing the technological impediments to accessing Strickland's telephone data. The State could have produced an expert to detail the State's attempts to access the data and the impossibility of those attempts. Similarly, the State could have presented evidence that the data on K.W.'s telephone and H.D.'s telephone had disappeared and was irretrievable. However, the State did none of this.

In the absence of circumstances justifying the use of testimony as to the contents of the text messages and photographs, it was plain error to admit the testimony. Accordingly, for this reason Strickland's conviction should be reversed and remanded for a new trial.

### **ARGUMENT III.**

#### **STRICKLAND RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.**

This Court typically does not address claims of ineffective assistance of counsel on direct appeal. *See McClendon v. State*, 152 So. 3d 1189, 1191 (Miss. Ct. App. 2014). The Court has explained:

It is unusual for this Court to consider a claim of ineffective assistance of counsel when the claim is made on direct appeal. This is because we are limited to the trial court record in our review of the claim[,] and there is usually insufficient evidence within the record to evaluate the claim. The Mississippi Supreme Court has stated that, where the record cannot support an ineffective assistance of counsel claim on direct appeal, the appropriate conclusion is to deny relief, preserving the defendant's right to argue the same issue through a petition for post-conviction relief. This Court will rule on the merits on the rare occasions where (1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge.

*McClendon v. State*, 152 So. 3d 1189, 1191-1192 (Miss. Ct. App. 2014) quoting *Aguilar v. State*, 847 So. 2d 871, 878 (Miss. Ct. App. 2002).

Where claims of ineffective counsel are considered, the Court applies the two-part test set out in *Strickland v. Washington*, 466 U.S. 668, 691 (1984). In order to show ineffective assistance under *Strickland* the Appellant must show: 1) that counsel's performance was deficient and 2) that there is a reasonable probability that, but for counsel's errors, the proceedings would have resulted differently. *See Cage v. State*, 149 So. 3d 1038, 1046 (Miss. 2014). There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 691.

Strickland contends that the current Record is sufficient to evaluate his trial counsel's effectiveness, at least as to counsel's failure to object to evidence regarding the contents of the text messages and photographs which were not entered into evidence. As discussed above, there

are strong arguments that, without more justification from the State, testimony regarding the contents of the text messages and photographs was inadmissible. There is no reasonable basis for not seeking exclusion of the evidence. No reasonable strategy could be served by allowing admission of such harmful testimony without access to the underlying proof. This is manifestly deficient performance by counsel.

The trial would have necessarily turned out differently had this evidence been objected to and excluded. Without testimony as to the contents of the text messages and the photograph, the State would have had no proof against Strickland whatsoever. Strickland would have been entitled to a directed verdict of not guilty.

Strickland's conviction should be reversed based on this ineffective assistance of counsel. Alternatively, should the Court conclude that the Record is insufficient to support Strickland's claim of ineffective assistance of counsel, Strickland requests that his argument be preserved so that he may pursue post-conviction collateral relief on this basis.

#### **ARGUMENT IV.**

##### **THE TRIAL COURT ERRED BY REFUSING TO ALLOW STRICKLAND TO DISCHARGE HIS COUNSEL AND OBTAIN REPLACEMENT COUNSEL.**

Strickland's counsel filed a Motion to Withdraw from representing Strickland on August 21, 2014, citing "serious philosophical and tactical differences concerning the approach and strategy for handling this action." (C.P. p. 12). At a hearing on the Motion, Strickland indicated that he wanted to discharge his attorney. (C.P. p. 17). Strickland stated to the Court:

I believe that Mr. Walker and I have different perspectives on how to present my case, and I feel like that for my best interest that I should have someone else to represent me so that he or she could possibly be able to see where I'm coming from and defend me in the matter that I feel fits me.

(T. p. 17). Strickland explained that he had insufficient funds to retain an attorney and requested a public defender. (T. p. 18). The Trial Court denied the attorney's Motion to Withdraw and denied Strickland's request to discharge his counsel. (T. p. 20). Strickland did not request a continuance of his trial date, but merely the discharge of his attorney. (*See, e.g.*, T. p. 17).

The United States Constitution and the Mississippi Constitution guarantee a criminal defendant the right to counsel. U.S. CONST. AMENDS. VI, XIV; MISS. CONST., ART. 3, §26. A criminal defendant is entitled to counsel of his choice. *Myers v. State*, 296 So. 2d 695 (Miss. 1974); *Gibbs v. State*, 141 So. 3d 1, 3-4 (Miss. Ct. App. 2013).

The Courts have noted that "[a] defendant has an absolute right to counsel, but his right to choose counsel is not absolute." *Rinehart v. State*, 883 So. 2d 573, 576 (Miss. 2004). The Court has affirmed the denial of replacement of counsel in "last minute" situations in which the change of counsel would result in delay. *See, e.g. Rinehart*, 883 So. 2d at 576.

The Record in this case reflects an acrimonious relationship between Strickland and his trial counsel. Strickland's counsel told the Court that he was retained by Strickland's mother,

not Strickland. (T. p. 16). Strickland's counsel explained an "uneasy relationship" between lawyer and client. (*Id.*). During the trial, Strickland's attorney made it clear that Strickland lacked trust in his lawyer and did not follow his attorney's advice. (T. p. 550-53).

Strickland was effectively denied counsel of his choosing and was represented at trial by an attorney he did not want, and who did not want to represent him. This case does not necessarily involve a "last minute" replacement of counsel which would have required a continuance. Neither Strickland nor his counsel requested a continuance of trial; rather they simply requested that Strickland's counsel be allowed to withdraw. The motion to withdraw was filed fifty three (53) days before trial, and denied by the Trial Court nineteen (19) days before trial. Strickland could have been appointed substitute counsel to try the case in this time period.

The Trial Court erred by denying this request and forcing Strickland to go to trial represented by Mr. Walker. Accordingly, Strickland's conviction should be reversed and remanded for a new trial.

## ARGUMENT V.

### **THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT AND SUFFICIENCY OF THE EVIDENCE.**

This Court evaluates a challenge to the weight and sufficiency of the evidence as follows:

Should the facts and inferences considered in a challenge to the sufficiency of the evidence "point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty," the proper remedy is for the appellate court to reverse and render. *Edwards v. State*, 469 So.2d 68, 70 (Miss. 1985) (citing *May v. State*, 460 So. 2d 778, 781 (Miss. 1984)); *see also Dycus v. State*, 875 So. 2d 140, 164 (Miss. 2004). However, if a review of the evidence reveals that it is of such quality and weight that, "having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense," the evidence will be deemed to have been sufficient. *Edwards*, 469 So. 2d at 70. *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005).

*Boyd v. State*, 977 So. 2d 329, 336 (Miss. 2008). The Court reviews the evidence in the light most favorable to the State. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993).

Strickland was charged with violating the following statute:

No person shall by any means, including computer, knowingly entice, induce, persuade, seduce, solicit, advise, coerce or order a child to produce any visual depiction of adult sexual conduct or any sexually explicit conduct.

MISS. CODE ANN. § 97-5-33(7). Section 97-5-31 defines the operative term "sexually explicit conduct" as follows:

"Sexually explicit conduct" means actual or simulated:

(i) Oral genital contact, oral anal contact, or sexual intercourse, as defined in

Section 97-3-65, whether between persons of the same or opposite sex;

(ii) Bestiality;

(iii) Masturbation;

(iv) Sadistic or masochistic abuse;

- (v) Lascivious exhibition of the genitals or pubic area of any person; or
- (vi) Fondling or other erotic touching of the genitals, pubic area, buttocks, anus or breast.

MISS. CODE ANN. § 97-5-31(b).

The only possible contention in this case is that the photograph of K.W. received by Strickland constituted “sexually explicit conduct” because it constituted a “lascivious exhibition of the genitals or pubic area” of the child.<sup>5</sup> However, as discussed below, the Record simply will not support this under Mississippi law.

The Mississippi Supreme Court has adopted Fifth Circuit’s precedent in determining whether material constitutes “lascivious exhibition of the genitals or pubic area of any person.” *See Hood v. State*, 17 So. 3d 548, 555 (Miss. 2009) citing *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001). The Court considers the following factors:

1. whether the focal point of the visual depiction is on the child's genitalia or pubic area;
2. whether the setting of the visual depiction is sexually suggestive, *i.e.* in a place or pose generally associated with sexual activity;
3. whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
4. whether the child is fully or partially clothed, or nude;
5. whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

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<sup>5</sup> There can be no serious argument that the photograph constituted “adult sexual conduct.” The photograph was of a child’s penis and nothing else. Thus, the only conceivable definition it met was of “sexually explicit conduct.” The only arguable component of “sexually explicit conduct” it could have satisfied is lascivious exhibition of the genitals under section 97-5-31(b)(v). As discussed below, the jury could not have determined that the photograph constituted such a lascivious exhibition without ever seeing the photograph.



6. whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

*Hood*, 17 So. 3d at 555. The list is not exhaustive and no one factor is dispositive. *Id.*

There is no evidence in the Record from which any reasonable jury could find that the photograph K.W. sent to Strickland constituted “lascivious exhibition of the genitals or pubic area.” The sum total of the evidence in the Record is the disputed contention that K.W. sent a photograph of an erect penis. It is not possible to determine whether the photograph constituted the prohibited “lascivious exhibition” without more than this.

In the absence of actual evidence, such as the photograph, the jury could not have found that the photograph constituted sexually explicit conduct beyond a reasonable doubt. Without examining the photograph there is necessarily reasonable doubt.

The Record will not support Strickland’s conviction. Based on the absence of evidence, the Court should have sustained Strickland’s motions for directed verdict. This Court should reverse Strickland’s conviction on this basis and order him discharged.

### **CONCLUSION**

Accordingly, for each of these reasons, Strickland’s conviction should be reversed.

**RESPECTFULLY SUBMITTED**, this the 17th day of July, 2015.

**MCLAUGHLIN LAW FIRM**

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**ATTORNEYS FOR APPELLANT**

**CERTIFICATE OF SERVICE**

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Brief of Appellant** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

**Hon. Smith Murphey V  
Circuit Judge  
Post Office Box 481  
Batesville, Mississippi 38606**

**Jim Hood  
John R. Henry, Jr.  
Office of the Attorney General  
Post Office Box 220  
Jackson, Mississippi 39205**

This the 17th day of July, 2015.

/s/ R. Shane McLaughlin

**CERTIFICATE OF FILING**

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Brief of Appellant** via the Court's MEC e-filing system.

This, the 17th day of July, 2015.

/s/ R. Shane McLaughlin